

**NO. PD-0429-16**

FILED  
COURT OF CRIMINAL APPEALS  
10/17/2016  
ABEL ACOSTA, CLERK

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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**RUSSELL LAMAR ESTES,**

**Appellant,**

**v.**

**THE STATE OF TEXAS,**

**Appellee**

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On Petition for Discretionary Review from the 2nd Court of Appeals  
Case No. 02-14-00460-CR

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**BRIEF OF RUSSELL LAMAR ESTES ON THE MERITS**

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**– ORAL ARGUMENT NOT PERMITTED –**

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**NO. PD-0429-16**

<b>RUSSELL LAMAR ESTES</b>	<b>§</b>	<b>IN THE COURT OF</b>
	<b>§</b>	
<b>VS.</b>	<b>§</b>	<b>CRIMINAL APPEALS</b>
	<b>§</b>	
<b>STATE OF TEXAS</b>	<b>§</b>	<b>IN AUSTIN, TEXAS</b>

**APPELLANT'S BRIEF**

**To The Honorable Judges of the Court of Criminal Appeals:**

Russell Estes, Appellant and Petitioner, respectfully submits this Brief on the Merits of Grounds One and Two presented in his Petition for Discretionary Review to this Court.

**STATEMENT OF THE CASE**

Appellant was charged by indictment with twenty-three felony counts under Cause Number 1388628R. (CR, 7-10).<sup>1</sup> Prior to trial, the State waived Counts Eight through Twenty-three of the indictment. (RR2, 5). On October 23, 2014, Appellant filed a Motion to Quash Counts 1-5 of the Indictment, alleging that § 22.011(f) of the Texas Penal Code is unconstitutional both facially and as applied to him. (CR, 78-121). The trial court denied Appellant's Motion. Appellant pleaded "not guilty" to all seven counts of the indictment. (RR002, 6-7). Appellant stood trial in the 396th

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<sup>1</sup> The Clerk's Record is referenced throughout this Brief as "CR," followed by the page number of the Clerk's Record. The Reporter's Record, which is comprised of seven volumes, is referenced with an "RR" followed by the volume number and the page number or Exhibit number within the Volume referenced (i.e., Volume 2, page 2 is referenced as "RR2, 2").

District Court of Tarrant County on five counts of sexual assault bigamy and two counts of indecency with a child. (RR002 - RR006). On November 5, 2014, the jury found Appellant guilty on Counts One through Seven and also made an affirmative finding on the special issue<sup>2</sup>. (RR6, 195; CR, 236-44). After a trial on punishment, (RR6, 6-103), the jury assessed Appellant's sentence at twelve years in the Texas Department of Criminal Justice on each count of sexual assault bigamy and ten years on each count of indecency with a child, with community supervision recommended on the latter. (CR, 254-260; RR6, 104).

On appeal to the Second Court of Appeals, Appellant raised ten points of error, one of which challenged the constitutionality of Tex. Penal Code Ann. § 22.011(f) as applied to him in this case. The Court of Appeals sustained Appellant's first issue, overruled his other nine issues, affirmed the trial court's judgments of conviction on Appellant's charges for indecency with a child in all respects, modified the trial court's judgments on Appellant's charges for sexual assault to reflect convictions for second-degree felonies, reversed the trial court's judgments on Appellant's charges for sexual assault as to punishment, and remanded the sexual assault cases to the trial court for a new trial on punishment only. The State filed a

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<sup>2</sup> The Special Issue was presented to the jury as: "Do you find beyond a reasonable doubt that [K.A.] was a person whom the Defendant, Russell Lamar Estes, was prohibited from marrying or purporting to marry or with whom Russell Lamar Estes was prohibited from living under the appearance of being married as defined by the offense of bigamy . . . ?" (CR, 243).

Petition for Discretionary Review on April 21, 2016, and Appellant filed a Petition for Discretionary Review on April 28, 2016. On September 14, 2016, this Court granted the State's Petition for Discretionary Review and granted Appellant's Petition for Discretionary Review on Grounds One and Two.<sup>3</sup>

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<sup>3</sup> Appellant presented three questions or grounds for review in his Petition. *See* Appellant's Pet. for Discretionary Review.

## **ISSUES PRESENTED**

Appellant presents the following two Issues in this Brief for review:

**Issue One:** Appellant's equal protection claim should be reviewed under strict scrutiny.

**Issue Two:** It was error for the Court of Appeals to affirm Appellant's sexual assault convictions as second-degree felonies and remand those charges to the trial court for a new trial on punishment, rather than order the prosecution of Appellant dismissed or remand the charges to the trial court to enter an order dismissing the prosecution.

## STATEMENT OF FACTS

Appellant has been legally married to Melanie Estes (nee Benavides) since October 18, 2003. (CR, 121; RR5, 49; RR7, State's Ex. 32). They lived in a house in Saginaw, Texas, with Appellant's three children from a prior marriage. (RR5, 49-51). On the night of March 9, 2013, Melanie and Appellant's son [REDACTED], who will be referred to throughout this brief as "J.E."<sup>4</sup>, left their house to return some movies to the nearby Blockbuster. (RR5, 60). They were gone for about five minutes, during which time Appellant was at the house with J.E.'s girlfriend, who will be referred to in this brief as "K.A." (RR4, 50; RR5, 60).

Two days later, Saginaw Police Officer Joe Bozenko was dispatched out to the house in response to a call from Appellant. (RR004, 45). According to Officer Bozenko, Appellant informed him that "his son informed [Appellant] that [J.E.]'s girlfriend had told him on Saturday night that [Appellant] was intoxicated, told that it was not the first time that [Appellant] and [K.A.] had been alone in the house, and that he looked at her like his daughter." (RR4, 49-50). Officer Bozenko further testified that Appellant told him his son had told him he had touched K.A.'s breast and that he (Appellant) did not know what happened or if anything happened but that he was intoxicated after drinking a bunch of alcohol. (RR4, 50). On March 11,

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<sup>4</sup> See Tex. R. App. Proc. 9.10.

2013, K.A. came to the Saginaw Police Department with her mother and stepfather and told Officer Tami McCluskey that someone put her up against the counter and rubbed her. (RR4, 68-69, 84-85; RR5, 30, 34). She also affirmatively stated that “it was not sex.” (RR4, 14; RR5, 34-35).

On March 27, 2013, Carrie Paschall, a child forensic interviewer employed by the Tarrant County District Attorney's Office, interviewed K.A. at the Alliance for Children in Fort Worth. (RR4, 253-4). Detective Brandon Badovinac of the Saginaw Police Department was there in a separate room watching the interview via video. (RR4, 60). After the interview, Detective Badovinac obtained a search warrant for Appellant's residence. (RR4, 61-62). The next day, Appellant came to the police department, where he was arrested. (RR4, 86-87; RR5, 66). The State filed charges against Appellant on April 12, 2013, and on August 30, 2013, a grand jury indicted Appellant. (CR, 13-16).

Prior to trial, Appellant filed a Motion to Quash Counts 1-5 of the Indictment. (CR, 78-121). He argued that Section 22.011(f) of the Texas Penal Code is unconstitutional both facially and as applied to him. *Id.* After a hearing, (RR2), the trial court denied Appellant's Motion. (RR3, 4).

At Appellant's trial, K.A. testified about a series of instances in which Appellant touched her on her stomach and her vagina, both over and under her clothing, put his finger in her vagina, performed oral sex on her, touched her breasts,

contacted her vagina with his penis, put his penis inside her vagina, put his penis in her mouth and make her “suck it,” made her masturbate him, tied her up, hit her with a paddle, contacted and penetrated her anus with his finger, rubbed her vagina over her clothes, and put his finger in her vagina and then in her mouth. (RR4, 162-201, 207). She testified about the night that J.E. and Melanie went to Blockbuster but denied texting Melanie while they were gone. (RR4, 213-4). She admitted telling Officer McCluskey that Appellant put her up against the counter and rubbed her and was saying things and that it was not sex. (RR4, 209-10).

The jury found Appellant guilty on all counts of the Indictment and answered, “We do,” to the Special Issue. (RR6, 195; CR, 236-44). Appellant was sentenced to twelve years in the Texas Department of Criminal Justice on each count of sexual assault bigamy. (CR, 254-258; RR6, 105). The trial court ordered his sentences on Counts One, Two and Three to run concurrent with each other and the probated sentences on Counts Six and Seven and the sentences on Counts Four and Five to run concurrently with each other and consecutively after the other twelve-year sentences. (RR6, 105).

## SUMMARY OF THE ARGUMENTS

Section 22.011(f) of the Texas Penal Code is unconstitutional as applied to Appellant in this case. The Second Court of Appeals found that, as applied to Appellant, Section 22.011(f) violates equal protection because it does not even have a rational governmental basis. The Court of Appeals was correct; however, the court did not decide what level of scrutiny to apply to Appellant's equal-protection claim. Because the application of Section 22.011(f) to Appellant in this case treats married and unmarried persons who are similarly situated differently under the law and operates to penalize Appellant for the exercise of his fundamental right to marry, Appellant's constitutional claim should be reviewed using strict judicial scrutiny, requiring the State to demonstrate that its action has been precisely tailored to serve a compelling governmental interest.

Because Section 22.011(f) is unconstitutional as applied to Appellant, his convictions and sentences under the statute are void. Therefore, having sustained Appellant's constitutional claim, the Court of Appeals should have reversed the trial court's judgment of conviction and sentence on the sexual assault bigamy charges and either ordered the prosecution of him dismissed or remanded this case to the trial court to enter an order dismissing the prosecution.

The Court of Appeals erred by using this Court's decision in *Thornton v. State* to support its decision to affirm the sexual assault convictions as second-degree

felonies and remand those charges to the trial court for a new trial on punishment only. *Thornton* is distinguishable, and the Constitution does not allow an appellate court to affirm any part of a void judgment. This Court should affirm the judgment of the Court of Appeals in part, reverse the judgment of the Court of Appeals in part, and order the prosecution of Appellant on the sexual assault bigamy charges dismissed (or remand this case to the trial court to enter such an order). See Tex. R. App. Proc. 78.1(a), (d).

## ARGUMENT

**Issue One: Appellant's equal protection claim should be reviewed under strict scrutiny.**

Appellant was convicted of five counts of sexual assault bigamy under Tex.

Penal Code Ann. § 22.011(f), which provides:

An offense under this section is a felony of the second degree, except that an offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

Under Section 25.01, an individual commits an offense if he is legally married and he:

(A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

(B) lives with a person other than his spouse in this state under the appearance of being married . . . .

Tex. Penal Code Ann. § 25.01(1) (West 2011). In the trial court and on appeal, Appellant argued *inter alia* that the sexual assault bigamy statute is unconstitutional as applied to him because it treats married and unmarried persons who are similarly situated differently and in effect punishes him for being married in violation of the Equal Protection Clause of the United States Constitution, which provides: “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” To comport with the Equal Protection Clause, a state classification that does not

disadvantage a suspect class or impinge upon the exercise of a fundamental right must bear some fair relationship to a legitimate public purpose. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Any law that **does** operate to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, however, requires “strict judicial scrutiny.” *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). “With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest.” *Plyler* at 217. As explained herein, the application of Section 22.011(f) to Appellant in this case should be reviewed using strict judicial scrutiny.

### **Court of Appeals Opinion and Applicable Case Law**

The Court of Appeals concluded that, under the circumstances of this case and as applied to Appellant, Section 22.011(f) “violates equal protection because it penalizes him differently than a similarly situated defendant without a rational basis for doing so.” *Estes v. State*, 487 S.W.3d 737, 750 (Tex. App.—Fort Worth 2016, pet. granted). The issue presented in the State’s Petition for Discretionary Review, which this Court granted, asks: “Did the Court of Appeals properly conclude that there was no rational basis for the appellant receiving disparate treatment?” State’s Pet. for Discretionary Review, p. 3. Before this Court can address that question, however, it must necessarily determine whether “rational basis” is the proper level

of scrutiny by which Appellant's equal protection argument should be reviewed. *See Cannady v. State*, 11 S.W.3d 205, 215 (Tex. Crim. App. 2000) ("In reviewing a statute for an equal protection violation, we must first determine the level of scrutiny required.").

The Court of Appeals eschewed making this determination, *Estes* at 747 n. 8, and the State assumed "that the Court of Appeals agreed that the appellant did not fall within a suspect class and that this statute's application did not interfere with a fundamental right." State's Pet. at 4. However, the Court of Appeals expressly stated that it "need not resolve that argument" because it found that, as applied to Appellant, Section 22.011(f) does not even have a rational governmental basis. *Estes* at 747 n. 8. The Court of Appeals' reasoning on this issue echoes the rationale of the U.S. Supreme Court in *Eisenstadt v. Baird*, wherein the Court struck down a Massachusetts law that criminalized the distribution of contraceptives to unmarried persons. 405 U.S. 438, 454-55 (1972). The Court concluded that there was no "ground of difference that rationally explains the different treatment accorded married and unmarried persons" under the law, *Id.* at 447, adding in a footnote that it did not have to address the statute's validity under the strict-scrutiny test "because the law fails to satisfy even the more lenient equal protection standard." *Id.* at 447 n. 7. This Court cited to that footnote in its opinion in *State v. Rosseau*, which addressed a facial constitutional challenge to Section 22.011(f). 396 S.W.3d 550, 557 n.7 (Tex.

Crim. App. 2013). Without expressly deciding what level of scrutiny to apply, this Court ruled that the statute is not facially unconstitutional because it is not unconstitutional in every possible respect. *Id.* at 558. Thus, the case law of this Court and of the U.S. Supreme Court is not clear on the level of review to apply to laws that provide dissimilar treatment for married and unmarried persons who are similarly situated violates the Equal Protection Clause. The Supreme Court has even hinted that the test may be different depending on the case. *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (“ . . . we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny.”).

**In this particular case, the State should be required to demonstrate that the application of Section 22.011(f) to Appellant in this case was necessary to serve a compelling governmental interest.**

The right to marry is a “fundamental” right for purposes of equal-protection analysis. *Zablocki*, 434 U.S. at 383. In the present case, because Appellant was legally married to Melanie Estes, he was prohibited from marrying or purporting to marry or living with any other person under the appearance of being married. See § 25.01(1). The State relied on Appellant’s marital status as the sole factual basis for charging him with first-degree felonies under Section 22.011(f) and even conceded at trial that “he’s prohibited from marrying [the complainant] because he’s already legally married, and that’s pretty much it.” (RR5, 172). Thus, Section 22.011(f)

operated to treat Appellant and his acts more severely based on his marital status and effectively penalized Appellant for exercising his fundamental right to marry by making what would be a second-degree felony if Appellant were not married a first-degree felony because, under the bigamy statute, K.A. was a person whom Appellant was prohibited from marrying or purporting to marry or with whom he was prohibited from living under the appearance of being married. If Appellant were an unmarried man but all the other facts of this case were exactly the same, then the offense he was charged with in Counts One through Five of the Indictment would have been a felony of the second degree. Therefore, the State should be required to demonstrate that the application of Section 22.011(f) to Appellant in this case was precisely tailored to serve a compelling governmental interest. *See Plyler* at 217; *Zablocki*, 434 U.S. at 383; *Loving v. Virginia*, 388 U. S. 1, 12 (1967).

There is at least one case in which the U.S. Supreme Court has subjected a law that provides dissimilar treatment for married and unmarried persons to the rational-basis test. *See Mathews v. De Castro*, 429 U.S. 181, 185 (1976). That case, however, did not involve a penal statute or criminal proceeding, and the distinction is important. As the Supreme Court said in *Skinner v. Oklahoma*, “When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” 316

U.S. 535, 541 (1942) (citations omitted). If disparate treatment of similarly situated individuals who commit the same wrongful acts is so “invidious” as to require strict-scrutiny review when their potential penalty upon conviction is sterilization, then why would any lesser standard of review be appropriate when the penalty is prison?

### **Conclusion**

In this case, Section 22.011(f) operated to treat Appellant and his acts more severely than if he were an unmarried person accused of doing the exact same things to the exact same complainant and thereby impinged on Appellant’s fundamental right to marry. Therefore, the constitutionality of the statute should be reviewed under the “strict scrutiny” standard. Appellant asks this Court to review his equal protection claim using strict scrutiny and affirm the part of the Court of Appeals’ decision declaring that the application of Section 22.011(f) to Appellant in this case violates equal protection. *See* Tex. Rule App. P. 78.1(a).

**Issue Two: It was error for the Court of Appeals to affirm Appellant’s sexual assault convictions as second-degree felonies and remand those charges to the trial court for a new trial on punishment, rather than order the prosecution of Appellant dismissed or remand the charges to the trial court to enter an order dismissing the prosecution.**

The Court of Appeals correctly concluded that, under the circumstances of this case and as applied to Appellant, Section 22.011(f) violates equal protection, but the court erred in reforming Appellant’s convictions under the statute as second-degree felonies and remanding those charges to the trial court for a new trial on punishment. Because Appellant “was convicted under an unconstitutional application of an otherwise valid penal statute,” there should not be a new trial. *Flores v. State*, 245 S.W.3d 432, 443 (Tex. Crim. App. 2008) (Cochran, J., concurring). Rather, the only appropriate disposition in these circumstances is a dismissal. *See, e.g., Ex parte Perry*, 483 S.W.3d 884, 918 (Tex. Crim. App. 2016) (remanding case to district court to dismiss indictment); *Long v. State*, 931 S.W.2d 285, 297 (Tex. Crim. App. 1996) (remanding to trial court to dismiss the prosecution); *Rucker v. State*, 170 Tex. Crim. 487, 342 S.W.2d 325 (1961) (reversing and ordering the prosecution dismissed). No other disposition is permitted under the United States or Texas Constitution.

The Court of Appeals reasoned that “[i]t would be an unjust windfall for us to order dismissal or acquittal on the sexual assault charges based on a violation of appellant’s constitutional rights relating only to an element that raised the offenses

to the level of first-degree felonies.” *Estes*, 487 S.W.3d at 750 (citations and internal quotations omitted). The court cited *Thornton v. State*, 425 S.W.3d 289, 298 (Tex. Crim. App. 2014), in support of this proposition, but *Thornton* did not involve a constitutional challenge to a penal statute. Rather, the language in *Thornton* on which the Court of Appeals relied addressed when an appellate court that has found the evidence insufficient to support an appellant's conviction should reform the judgment to reflect a conviction for a lesser-included offense. This Court ruled that “[a]ny time the State carries its burden with respect to this lesser offense, and the jury, by its verdict, has necessarily found every constituent element of that lesser offense, the appellant would enjoy an ‘unjust’ windfall from an outright acquittal.” 425 S.W.3d 289, 298 (Tex. Crim. App. 2014). The Court of Appeals did not cite to any case (and there does not appear to be one) in which a judgment of conviction and sentence under an unconstitutional statute was affirmed in part and reversed only as to punishment.

Even if it were constitutional to dispose of this case the way the Court of Appeals did, logic, common sense and basic notions of justice and fairness weigh against applying the holding(s) in *Thornton* to the situation at bar, especially given the differences between the two scenarios. A finding that the application of a particular penal statute to a defendant violates the Constitution is in effect a finding that said defendant never should have been charged under the statute in the first

place, whereas a finding that the evidence admitted at trial is legally insufficient to support a conviction says nothing about the prosecution per se. In the latter situation, the prosecution of the accused for the charged offense may be perfectly sound and not violative of any statutory or constitutional right; it is only the jury's guilty verdict that offends due process. In the former situation, however, the very act of prosecuting the accused is unconstitutional. Thus, reformation makes sense in cases like *Thornton*, where the issue on appeal is the sufficiency of the evidence, and the evidence is insufficient to support an appellant's conviction but sufficient to support a conviction for a lesser-included offense, because the constitutional infirmity in such a case can be cured by reversing the trial court's judgment and acquitting the appellant of the greater-inclusive offense only. There is no need for an "outright acquittal." Further, under the *Thornton* test, reformation is only authorized if, in the course of convicting the appellant of the greater offense, the jury must necessarily have found every element necessary to convict the appellant for the lesser-included offense, so no constitutional violation results from reforming the judgment to reflect a conviction for the lesser-included offense. 425 S.W.3d at 300.

In addition, the "unjust windfall" that the Court of Appeals thought Appellant would receive from a dismissal of the sexual assault charges is not like the "unjust windfall" to be avoided in *Thornton* and like cases. Most significantly, Appellant would not receive an "outright acquittal" if the prosecution against him on the sexual

assault charges were dismissed because he could be retried. Section 22.011(f) is unconstitutional as applied to Appellant. Therefore, his convictions and sentences under the statute are void and cannot form the basis for a plea of jeopardy. *See Lowry v. State*, 671 S.W.2d 601, 604 (Tex. App.—Dallas 1984) (citing *Benard v. State*, 481 S.W.2d 427, 430 (Tex. Crim. App. 1972)) (“An unconstitutional statute is void from inception and will sustain neither a conviction nor a plea of prior jeopardy.”), *aff’d in part and rev’d in part*, 692 S.W.2d 86 (Tex. Crim. App. 1985). Put another way, because the prosecution of Appellant for sexual assault bigamy in this case should be considered a “void proceeding” that “has no effect in support of a plea of former conviction or acquittal.” *Barnes v. State*, 79 Tex. Crim. 395, 398, 185 S.W. 2, 4 (1916). Were Counts 1 through 5 of the Indictment in this cause to be dismissed (which, again, is the only proper remedy), there would be no legal bar to the State refiling sexual assault charges against Appellant as second-degree felonies based on the same facts. Affirming Appellant’s convictions and remanding for a new trial on punishment only actually gives the **State** an “unjust windfall” in this case by upholding an unconstitutional conviction.

Finally, although the Court of Appeals accepted the State’s argument that “it should remand this case only for a new punishment hearing since the error only affected [Appellant’s] range of punishment,” State’s Br., p. 21, it did not reference Tex. Code Crim. Proc. art. 44.29(b), the authority the State cited in support of its

position. It warrants mention here that Article 44.29(b) does not authorize the Court of Appeals to dispose of this cause the way it did. Article 44.29(b) covers situations in which an appellate court awards a new trial to a defendant “only on the basis of an error or errors made in the punishment stage of the trial.” The error here pervaded Appellant’s entire trial. The Special Issue was submitted to the jury at the guilt-innocence stage of trial. (RR, 243-44). There was only one legal remedy for the Court of Appeals after it sustained Appellant’s constitutional claim: dismissal of the indictment. *See Perry, supra; Long, supra; Rucker, supra.* Appellant asks that this Court affirm the part of the Court of Appeals’ decision declaring that the application of Section 22.011(f) to Appellant in this case violates equal protection, reverse the judgment of the Court of Appeals in part, and either order the prosecution of him on the sexual assault bigamy charges dismissed or remand this case to the trial court to enter an order dismissing the prosecution. *Id.*; Tex. Rule App. P. 78.1(a), (d).

## **PRAYER**

Because Section 22.011(f) of the Texas Penal Code, as applied to Appellant in this case, provides dissimilar treatment for married and unmarried persons who are similarly situated and penalizes Appellant for exercising his constitutional right to marry, this Court should apply strict scrutiny when reviewing Appellant's equal-protection challenge to the constitutionality of the statute. The Court of Appeals correctly concluded that, under the circumstances of this case and as applied to Appellant, Section 22.011(f) violates equal protection, but the court erred in reforming Appellant's convictions under the statute as second-degree felonies and remanding those charges to the trial court for a new trial on punishment only. Appellant prays that this Court: (1) affirm the judgment of the Court of Appeals in part; (2) reverse the part of the judgment of the Court of Appeals modifying the trial court's judgments on the charges for sexual assault to reflect convictions for second-degree felonies, reversing the trial court's judgments on the charges for sexual assault as to punishment only, and remanding the sexual assault cases to the trial court for a new trial on punishment only; and (3) either order the prosecution of Appellant on the sexual assault bigamy charges dismissed or remand this case to the trial court to enter an order dismissing the prosecution.

Respectfully Submitted,

/s/ Brian W. Salvant

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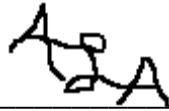
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### **CERTIFICATE OF SERVICE**

On October 14, 2016, I hereby certify that a true and correct copy of the foregoing Brief was or will be served upon Steven W. Conder, Assistant Criminal District Attorney, Tim Curry Criminal Justice Center, 401 W. Belknap Fort Worth, Texas 76196, via e-mail to [ccaappellatealerts@tarrantcounty.tx.gov](mailto:ccaappellatealerts@tarrantcounty.tx.gov), and upon Lisa McMinn, State Prosecuting Attorney, by placing same in the United States mail, proper postage affixed, to P.O. Box 13046, Austin, TX 78711.

/s/ Adam L. Arrington  
Counsel for Appellant

### **CERTIFICATE OF COMPLIANCE**

I certify that this document complies with Tex. R. App. P. 9.4, specifically using a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains 3,963 words, excluding those parts specifically excepted by Tex. R. App. P. 9.4(i)(1), as computed by Microsoft Office Word.

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